IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 10TH SEPTEMBER 2007 / 19TH BHADRA 1929

SA.No. 210 of 1994()

(AGAINST DECREE DATED 15/07/1993 OF THE LEARNED SUB JUDGE THALASSERY IN AS.245/1992 AGAINST DECREE DATED 31/08/1992 OF THE LEARNED MUNSIFF OF KUTHUPARAMBA IN OS.172/1984)

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APPELLANTS:APPELLANTS:PLAINTIFFS:

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1. **KARRAVELLAN DEVAKI, W/O.ACHUTHAN, RESIDING AT KELOTH VALAPPIL IN MANAMTHERI AMSOM, CHITTARIPARAMBA DESOM, TELLICHERRY, DIST.KANNUR.**
2. **KARRAVELLAN PADMANABHAN, S/O.DEVAKI, RESIDING AT ...DO...DO....**
3. **KARRAVELLAN SREEDHARAN, S/O.DEVAKI, ..DO...DO....**
4. **GOURI, D/O.DEVAKI, RESIDING AT ...DO...DO....**
5. **DAMU, S/O.DEVAKI, RESIDING AT....DO...DO.....**
6. **ASHOKAN, S/O.DEVAKI, RESIDING AT ...DO..DO....**
7. **KARAAVELLAN BALAKRISHNAN, S/O.ACHUTHAN, RESIDING AT ...DO...DO....**

BY ADV. SMT.VIDHYA. A.C

RESPONDENTS: RESPONDENTS-DEFENDANTS:

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1. **KARUVATHI CHIRUTHAI, D/O.PAITHAL, MANANTHERI AMSOM, CHITTARIPARAMBA DESOM, TELLICHERRY TALUK, DIST. KANNUR.**
2. **KARUVAN REVINDRAN, S/O.CHIRUTHAI, RESIDING AT....DO..DO..**
3. **KARUVATHI SOUMINI, D/O.CHIRUTHAI, WEAVER IN KHADI BOARD, RESIDING AT ....DO...DO....**
4. **KARUVATHI USHA, D/O.CHIRUTHAI, RESIDING AT ..DO..DO...**

BY ADV. SRI.T.R.RAVI for Respondents

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 10/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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M.SASIDHARAN NAMBIAR, J.

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S.A.No. 210 OF 1994

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DATED THIS THE 10th DAY OF SEPTEMBER, 2007

JUDGMENT

Plaintiffs in O.S.172 of 1984 on the file of Munsiff Court, Kuthuparamba are the appellants. Defendants are respondents. Appellants originally instituted the suit seeking a decree for permanent prohibitory injunction. After trial, suit was dismissed holding that plaintiffs did not establish possession or identity of plaint schedule property, as the Commissioner in Ext.C1 report and C2 plan did not identiry the disputed property as the property covered under Ext.A1 to A4 claimed by appellants. Appellants challenged the decree and judgment before Sub Court, Thalassery in A.S.245 of 1992. First appellate court remanded the suit granting an opportunity to plaintiffs to amend the plaint, seeking a decree for recovery of possession on the strength of title, as it was pointed out that court fee was paid under Section 27(a) of Kerala Court Fee and Suit Valuation Act. After the suit was remanded, plaint was amended seeking a decree for recovery of possession on the strength of title. Defendants filed an additional written statement contending that even if plaintiffs have title, it is lost by adverse possession

and limitation. No oral evidence was adduced thereafter. No further Commission was taken out to identify the property. The Commissioner was also not examined. The only subsequent evidence adduced was production of Ext.A20 series to tax receipts.

2. Trial court, on the evidence of PW1, DW1 and Exts.A1 to A20 and B1 to B10, dismissed the suit holding that appellants did not establish the title and the evidence did not establish that plaint schedule property is the property covered under Ext.A1 to A4. Appellant challenged the decree and judgment before Sub Court, Thalassery in A.S.245 of 1992. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff that appellants did not establish either the identity of plaint schedule property or the title and dismissed the appeal. It is challenged in the second appael.

3. The second appeal was admitted formulating the following substantial questions of law.

1) Is the finding of first appellate court vitiated by misreading of evidence and misconstruing the documents.

2)In the light of Ext.A1 to A20 and evidence of PW1, whether courts below were legally justified in holding that appellants did

not establish their title to the plaint schedule property.

4. Learned counsel appearing for the appellants and respondents were heard.

5. The argument of the learned counsel appearing for appellants is that the plaint schedule property admittedly originally belonged to Kunhikammaran Nambiar and it was obtained on oral kuzhikanam by Kumbha, the grand mother of first respondent and under Ext.A1 an extent of 5 X 4 six feet koles was assigned by Kumbha in favour of Kasthoori Sankaran and subsequently under Ext.A2 Kasthoori Sankaran assigned that property in favour of Keloth Koorma Achuthan and on his death his right devolved on first appellant widow and appellants 2 to 7 the children and the remaining extent of property was assigned by Kumbha in favour of Kunhiraman Paidal and he assigned it in favour of M.C.Raghavan Nair under Ext.A3 assignment deed and thereafter it was purchased by second appellant for and on behalf of all appellants under Ext.A4 assignment deed and therefore appellants have title to the property and courts below did not properly appreciate the evidence. It was argued that though the survey number shown in Ext.A1 to A4 are not correct, appellant had filed an application

to amend the correct survey number and the evidence establish that plaint schedule property is the property covered under Ext.A1 to A4 and therefore appellants have title to the property and respondents are claiming right only under the will executed by their father and the father had no right over the property and therefore courts below should have granted the decree.

6. Learned counsel appearing for respondents pointed out that trial court and first appellate court found that plaint schedule plroperty is not identified, as the property covered under Ext.A1 to A4 and survey number and the extent of the property do not tally and that factual finding of trial court was confirmed by first appellate court and after remand appellants did not adduce any evidence and even the Commissioner was not examined and in such circumstances, finding of courts below that appellants did not establish their title to plaint schedule property is perfectly correct and appeal is only to be dismissed.

7. After the remand, plaint was amended and suit was converted into a suit for recovery of possession on the strength of title. Hence appellants can succeed in the suit only on establishing their title. They cannot get the decree either on the failure of defendants to prove their title or on the weakness of

the defence case. They have to establish that plaint schedule property is the property covered under Ext.A1 to A4 and therefore they have title to the property. The case of appellants is that out of the plaint schedule property 5 X 4 six feet koles extent of the property was obtained by Kasthoori Sankaran under Ext.A1 assignment deed and thereafter under Ext.A2, their predecessor Keloth Koorma Achuthan obtained their property and they have title to the same. They also contend that the remaining portion of the plaint schedule property was obtained on kuzhikanam right by Kunhikaraman Paidal and under Ext.A3 he assigned the property in favour of M.C. Raghavan Nair and under Ext.A4 that title also vest with the appellants. Trial court and first appellate court found that plaint schedule property is not proved to be the property covered under Ext.A1. The survey number shown in Ext.A1 to A4 do not tally with the survey number of plaint schedule property. The Commissioner has also found that plaint schedule property cannot be identified with reference to boundaries shown in Ext.A1. Learned counsel appearing for appellants argued that the eastern boundary of Ext.A1 is the property in the possession of Kunhiraman Paidal, which is the property obtained under

Ext.A3 ad A4 and the northern boundary is public road and therefore the property can be identified.

8. Though Ext.A1 shows that eastern boundary of the property is in the possession of Kunhiraman Paidal and appellants would contend that the said property was purchased under Ext.A3 and A4, the western boundary of the property, covered under Ext.A3 and A4, is not shown as property covered under Ext.A3 and A2. Therefore it is futile for appellants to contend at this stage that property can be identified with reference to the eastern boundary. The northern boundary of Ext.A1 to A4 is shown as only road. It could be any road, at any place and need not necessarily be the northern boundary of the plaint schedule property. Even though it was argued that the identification of the Commissioner is not correct, Commissioner was not examined and it is not proved that the identification made by Commissioner is not correct. It is to be borne in mind that originally the suit was dismissed by the trial court holding that the property is not identified and plaint schedule property is not proved to be part of Ext.A1 to A4 property. In spite of that finding and the fact that suit was remanded back to the trial court and suit was converted into a suit for recovery of

possession, appellants did not take any further steps to get the property identified. In such circumstances, courts below rightly appreciated the evidence and found that appellants failed to prove that plaint schedule property is the property covered under Ext.A1 to A4 and therefore they have no title to the property. That factual finding cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure. As appellants did not establlish their title, they are not entitled to the decree for recovery of possession. There is no merit in the appeal. It is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

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